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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 289

MILTON MARGOLES, *Petitioner,*

against

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the captioned case on March 4, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Appendix A, Pages 1a-15a) appears at 407 F.2d 727 (1969). No petition for rehearing was filed. The United States District Court

for the Eastern District of Wisconsin denied petitioner's motion to vacate sentence in an unreported Opinion and Order dated December 29, 1967 (Appendix A, Pages 15a-22a). A motion to reconsider was also denied in an unreported Order on February 26, 1968 (Appendix A, Page 23a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1969. By order dated May 26, 1969, Mr. Justice Marshall extended until July 2, 1969, the date by which a petition for certiorari in this case might be filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner Margoles was convicted of attempting to obstruct justice and unlawfully influence a federal officer, the Honorable Robert E. Tehan. His sole defense was entrapment. Through a motion to vacate sentence properly filed with the District Court, petitioner sought to attack his convictions on the grounds that the proceedings were saturated with prejudicial publicity both before and during trial, that Judge Tehan himself had made a pretrial press release seriously prejudicial to the petitioner, and that the trial court had erred in failing to properly safeguard the jury from the effects of the publicity. The District Court denied the motion, and the Court of Appeals affirmed.

The questions presented are:

I. Having just tried and sentenced the defendant on another well publicized charge, may the Chief Judge of

the court in which the defendant has been indicted for attempting to bribe that judge, make with impunity a press release carried by all the local media detailing his version of the alleged bribe attempt a few days before, and emphatically praising the government's star witness, a "friend of a friend" of petitioner, who had agreed to cooperate with the F.B.I. in ensnaring the petitioner?

II. Do the prosecution and law enforcement arms of the government have unlimited discretion to release whatever pretrial information they like to the news media regardless of its inaccuracy and prejudicial effect; or are an accused's rights under the Fifth Amendment violated when the government makes disclosures that are likely to prove prejudicial at trial?

III. Does the right of the public to be informed of the progress of a criminal trial so outweigh the accused's right to a fair trial under the Fifth Amendment that the press may publicize the substance of inadmissible and very damaging evidence presented outside the presence of an unsequestered jury; and if not, what are the proper limitations upon the press, and by what means may the court enforce those limitations?

IV. Is an accused deprived of a fair trial when, in the midst of overwhelming public interest and the publication of dozens of prejudicial news stories, jurors familiar with press accounts of the case, some of whom have already formed opinions, are not examined as to the basis for their subjective assurances that they can impartially try the case, nor carefully questioned during the trial as to whether they have read or heard news accounts of testimony taken out of the jury's presence and ruled inadmissible?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution is set forth in Appendix B, at page 24a. The provisions of the United States Code cited in the indictments and returned against petitioner, and those sections under which petitioner attacked his convictions, are set forth in the same appendix at pages 24a-26a.

STATEMENT OF THE CASE

On October 11, 1960, a federal jury found Dr. Milton Margoles, petitioner herein, guilty of attempting to obstruct justice and unlawfully influence a federal officer—the Honorable Robert E. Tehan—both in violation of 18 U.S.C. § 1503. Petitioner was acquitted of a bribery count contained in an earlier indictment involving the identical facts.* The convictions were affirmed on appeal. *Margoles* v. *United States,* 294 F.2d 371 (7th Cir.), *cert. denied,* 368 U.S. 930 (1961). Petitioner subsequently filed a motion to vacate sentence under 28 U.S.C. § 2255 and § 1651. The motion was denied, and the denial affirmed by the United States Court of Appeals for the Seventh Circuit.

All the charges stemmed from events that occurred immediately after petitioner had, on June 3, 1960, been sentenced by Judge Tehan in another proceeding to a year in prison and fined $15,000 for income tax violations to which he had pleaded *nolo contendere.* On October 24, 1960, after conviction on the two counts of attempting to obstruct justice and influence a federal officer, he was sentenced to an additional term of

* Indirectly offering a thing of value to a federal judge (hereinafter sometimes referred to as the "bribery charge").

five years on each count, to run concurrently with each other, and consecutively to the previous one year term imposed for the tax violation. Petitioner paid the fine, served his sentences, and was paroled from the federal correctional institution at Sandstone, Minnesota in late 1962. His parole expired on October 20, 1966.

It was undisputed at petitioner's trial that on July 12, 1960, he turned over a $5,000 Treasury bond to one Earl Villmow for the purpose of obtaining a suspended sentence on his tax conviction. The testimony was in conflict on the principal issue, however—who originally contrived the idea of approaching Judge Tehan. Petitioner contended that the scheme originated with Villmow (who, the F.B.I. admitted, became a government agent prior to contacting Dr. Margoles), that it was Villmow who originally and continually injected the judge's name and the subject of money into their conversations, and that Villmow unlawfully entrapped petitioner on the government's orders. The government's position was that petitioner devised the plan and that the bond was to be paid to the judge in order to gain his favor.

The prosecution's case rested heavily on Villmow's testimony and credibility, and if the jury were to disbelieve him it would have had to acquit petitioner under the court's erroneous instruction on the defense of entrapment.

Pretrial Publicity

Widespread and prejudicial publicity emanating primarily from government sources was directed against the defendant both before and during his trial. During the two and one-half months between the

bribery indictment and trial,[1] petitioner was the subject of dozens of articles in Milwaukee's two major newspapers, the *Milwaukee Journal* and the *Milwaukee Sentinel*, the first of which alone reached 84 percent of the households in Milwaukee County where all but one of the Margoles jurors lived.[2] Virtually all the articles appeared on either the front page or the "second" front page (the first page of the local news section) (R. 14-24, 80-95),* and all were in varying degrees adverse to the petitioner. It may be fairly inferred that radio and television coverage was comparable.

Only a very small portion of the news accounts were accurate and unbiased, and it is plain that the media cast the doctor as a public enemy. On many occasions he was the subject of deceiving headlines such as "BID TO ELUDE F.B.I. CHARGED TO MARGOLES" (R. 16) and "OFFICERS SAY MARGOLES PLANNED BIGGER BRIBE" (R. 20). The government's allegations were again and again treated as if they were proven facts. At the same time, however, Villmow, the prosecution's key witness (whose testimony was crucial to a determination of the sole defense of entrapment) was consistently portrayed as a hero and a public-spirited citizen who had reported the alleged bribe attempt to the F.B.I. immediately (R. 14-15, 19-24, 80-81, 87-89). Headlines reported, "BRIBERY CASE TRIGGERED BY

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[1] During this period, the second indictment, upon which petitioner was ultimately convicted, was handed down, generating renewed interest in petitioner's case.

[2] Statistics provided by the *Milwaukee Journal*.

* R. = Original transcript of record in the United States Court of Appeals; T. = Transcript of trial proceedings in the United States District Court; V. = Transcript of proceedings upon voir dire.

INFORMANT" (R. 19), "BRIBERY CASE TIPSTER PRAISED" (R. 21) and "TEHAN DETAILS BRIBERY CASE, U. S. JUDGE EXPLAINS FIREMAN'S UNWITTING PARTICIPATION" (R. 24).

The media repeatedly distorted and misrepresented the facts surrounding the charges. The trial transcript is silent, for example, as to the substance of conversations held among Villmow, Robert Tehan, Jr. [the judge's son], Peter Pikofsky (a mutual friend of the two) and the judge on June 28, 1960,[3] but both the *Journal* and the *Sentinel* carried numerous stories characterizing Villmow as having "reported" the alleged bribe attempt to Judge Tehan or as having "tipped-off" the judge about it (R. 14, 20, 80, 87-88). Similarly, although the transcript reveals that the F.B.I. arranged and observed the meetings between Villmow and the accused (T. 89-91, 337-39), an article in the *Sentinel* on August 4, 1960, said there were no witnesses to any of their meetings (R. 87).

Nearly all the pretrial publicity originated with one or another arm of the federal government. The clerk of the District Court publicly acknowledged the need for extraordinary steps to preserve petitioner's right to a fair trial, but even this became the subject of a newspaper article. On September 12, 1960, the *Journal* reported, under the headline "100 JURORS DRAWN FOR MARGOLES CASE" (R. 95), that

> The special panel was ordered by Dale E. Ihlenfeldt, clerk of the federal courts here in

[3] Dr. Margoles did not become involved in this series of events until he was called by Pikofsky four days later. According to Villmow's own testimony, when he urged Dr. Margoles to hire the judge's son, attorney Robert Tehan, Jr., Dr. Margoles indicated that he did not even know of the judge's involvement (T. 273-76).

anticipation of a large number of disqualifications due to the widespread publicity given the case.

Drawing a special jury to hear a criminal case is "very unusual," according to Ihlenfeldt. He said that this was the first such special panel in his almost six years as clerk.

Many of these articles gave source credit to the prosecution itself and to Edward E. Minor and Matthew Corry, the United States attorneys in charge of the case (R. 14, 17-19, 81, 87, 93). Minor, for example, publicly praised Villmow as Dr. Margoles' "intended intermediary" who was under "instructions 'to offer the bond as a bribe to Judge Tehan . . . .'" (R. 14).

Other articles specifically credited the F.B.I. and Gerald C. Gearty, the agent in charge of the local office (R. 16, 19-20, 80). One such article quoted Gearty as stating that Villmow "throughout has fully cooperated with the U.S. government" (R. 19). Still others, detrimental to Dr. Margoles' character, attributed information to other federal officials, including Emil J. Nelson, Director of the Internal Revenue Service for Milwaukee (R. 86, 88). On August 4, 1960, Mr. Nelson, in an article on the "second" front page of the Journal, described a jeopardy tax assessment filed against petitioner as a device "levied only when there is evidence that a deficient taxpayer is distributing assets or putting assets beyond the reach of government collectors" (R. 88).

The day after petitioner's arrest, mysterious "federal authorities who cannot be quoted" were credited with informing the papers that the bond "was only the first installment of a much larger bribe" (R. 20),

though the indictment contained no hint of bigger bribes. There was a steady stream of pretrial articles containing information harmful to the accused which, almost without exception, could not have been written without the active assistance and cooperation of the prosecution and federal law enforcement officials.

In the midst of all this publicity, only two days after petitioner's indictment and arrest, there appeared in the Sunday *Journal* an article headlined, "TEHAN DETAILS BRIBERY CASE, U.S. JUDGE EXPLAINS FIREMAN'S UNWITTING PARTICIPATION" (R. 24). The article began:

> Milwaukee fireman Earl W. Villmow unwittingly and innocently became the vehicle for the alleged attempt by Dr. Milton Margoles to bribe Federal Judge Robert E. Tehan, according to a letter made public Saturday by the Judge.

The story then divulged the contents of a detailed letter written by Judge Tehan—the judge who had heard and sentenced petitioner on the tax charge—to the local fire chief (Villmow's employer), and released to the press by the judge. A similar article was also carried in the Sunday *Sentinel* under a banner headline stretching across the entire top of the "second" front page, reading "BRIBERY CASE TIPSTER PRAISED" (R. 22).

The judge lauded Villmow's part in the whole matter as being, "in my opinion, an outstanding example of good citizenship," and personally praised Villmow as having "reflected great credit" on the fire department. After pointing out that Villmow's testimony was of "vital importance," Judge Tehan proceeded to detail his version of the "facts" surrounding the over-

tures which passed among himself, his son, Villmow, Dr. Margoles, and Peter Pikofsky.[4]

Publicity During Trial

The intensity and character of the news coverage created great community interest in the trial. Newspapers reported that the proceedings were held in a "tense and crowded courtroom" (R. 29) "filled to capacity" (R. 31), and that "tension was high throughout the eight day long case" (R. 46). The *voir dire* became critical, since the District Court had denied petitioner's pretrial motion for a continuance. Despite the publicity, the court did not transfer the case to another part of the judicial district less saturated with publicity, nor had it ordered the drawing of a special panel of veniremen from a distant area of the district, even though in Racine County, also a part of Wisconsin's Eastern District, the *Journal* reached only 13 per cent of the households.[5]

It became apparent during the *voir dire* that many prospective jurors had read about the case, had discussed it with others, and had formed opinions as to guilt or innocence. For the most part the *voir dire* was conducted by the trial judge. The veniremen were not examined individually out of the presence of the others, but were addressed as a group, even when someone

[4] Following petitioner's arrest on July 15, 1960, the *Journal* of that date reported that "it was learned" that Judge Tehan was considering revoking a stay of sentence granted earlier on the tax conviction (R. 16). The source of that information on the judge's intent was not disclosed, however. A few days later a similar article appeared, stating that "Federal officials" were considering cancelling the stay (R. 23).

[5] Counsel's failure to request these remedies could not have been easily overlooked by the District Court.

responded affirmatively to a question. Although numerous veniremen conceded having formed opinions, the court made no attempt to evaluate for itself either the bases for or the strength of their biases. Instead, at one point it explained to the potential jurors that it was the civic duty of citizens to serve as jurors. One of the veniremen volunteered that he had "read about the case," but the trial judge responded, "that's not the question" (V. 25). The court simply elicited and accepted from each prospective talesman his own brief, subjective assurance that he could be impartial (V. 24-28, 56-65, 96-98).

The court made only general inquiries as to whether the veniremen had read or heard about the case and whether they had formed or expressed any opinion regarding the defendant's guilt or innocence. This was true in the case of Mr. Dix and Mr. Apel, for example. Mr. Apel informed the court that he had formed an opinion regarding petitioner's guilt. Mr. Dix, ultimately one of the twelve jurors selected, said that he had discussed the case with his wife (V. 25). The trial judge made no inquiries as to what he had read about the case, however, nor was he warned not to reveal what he had read to his fellow jurors.

Though neither the jury nor the witnesses had been sequestered, the Milwaukee newspapers escalated their coverage of the case as the trial began. From the date the jury was impaneled until two days after the verdict, articles appeared in the *Journal* and the *Sentinel* every day but one, invariably on either the front page or the "second" front page.

On the first day of trial the court granted defendant's motion that witnesses be excluded from the

courtroom. Throughout the trial, however, both of Milwaukee's major papers carried detailed summaries of the testimony of each witness, along with objections of counsel and rulings by the court (R. 27-45). On the second day of trial, the names, ages and addresses of all the jurors and alternates were published in the *Journal* (R. 29).

The papers continued to headline the trial. "MARGOLES' COUNSEL RIPS INTO BRIBE TESTIMONY, READS TRANSCRIPT OF GRAND JURY HEARING: THEN TRIES, BUT FAILS TO SHAKE WITNESSES" (R. 31); "JURY HEARS TESTIMONY ON 'MARGOLES FLIGHT'; FBI AGENTS REPORT, OVER OBJECTIONS HOW DOCTOR DEPARTED FROM HOSPITAL" (R. 34); "TESTIFIES HE STARTED IT ALL, 'THIRD MAN' IN BRIBE TRIAL TELLS OF LINK TO DR. MARGOLES" (R. 37).

Proceedings held outside the presence of the jury were also published. On the fourth day of trial, counsel for petitioner, out of the jury's presence, objected to testimony of one Wendelin Kraft, who was to be called as a witness for the prosecution to testify that petitioner allegedly asked him three times to intercede with Judge Tehan. The trial court excluded this evidence. At the close of the government's case the same day, also out of the jury's presence, counsel moved for a judgment of acquittal based on the defense of entrapment. After hearing argument, and before the jury reentered the courtroom, the court denied defendant's motion (T. 513-14). That evening, the substance of the inadmissible Kraft testimony was detailed on the front page of the *Milwaukee Journal* (R. 35) and was carried on the *Journal's* television channel's eve-

ning news, with Kraft's picture (T. 661-63).[6] The following morning the *Sentinel* carried the story of the denial of petitioner's motion for acquittal under the headline, "DENIES 'TRAP' PLEA TO ACQUIT MARGOLES" (R. 36).

That the jurors had access to these headlines and stories is not only dictated by logic, but evidenced by a statement of the jury foreman. Having been asked whether certain matters were discussed in the jury room, he replied, "No, there was no mention at all that I know of, not in the section I sat in. As soon as I went in, *I read the paper. . . .*" (T. 806) (emphasis added).

On October 11, 1960, the jury rendered its decision.

REASONS FOR GRANTING THE WRIT

First: Because of the position of public influence and trust held by federal judges, this Court must vigorously scrutinize conduct by the bench that publicly destroys the presumption of innocence prior to trial, and tips the scales of justice in favor of the government. In light of the dictates of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), in which the prosecution was faulted for its public, extra-judicial statements, there is a compelling need to condemn injudicious, partisan remarks by a member of the bench who is personally and intimately involved in a pending case.

Second: Meaningful guidelines must be established to implement the general policies set forth in *Sheppard*. Since that decision, numerous District Courts and

[6] The court took no action on petitioner's motion for a mistrial on the basis of the publicity given the Kraft testimony.

Courts of Appeals have been confronted with instances of prejudicial publicity, both before and during trial, and have generally responded, as seemingly required by *Sheppard,* by evaluating the facts of each case and determining whether the level of prejudice resembles that reached in *Sheppard.* This method has proven inadequate, however, since the *Sheppard* doctrine is difficult to apply. Cases like the instant one point up the need for clearer guidelines in determining whether prejudice to the accused exists or can be inferred in a given case. The goals sought in *Sheppard* can be accomplished only by declaring that the government itself must bear a greater responsibility for curtailing the outflow of prejudicial information likely to reach the press, and by determining whether specific guidelines on what the government can release to the media should be set down, just as specific "warnings" were ultimately held the only effective answer to the conditions which produced *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

Third: This Court should expand the rule of *Marshall* v. *United States,* 360 U.S. 310 (1959), to insure that inadmissible evidence in a criminal proceeding does not reach the minds of jurors through the public media. The decision of the Court of Appeals in this case demonstrates the need for a clearer rule on whether the press should be permitted to publish with impunity accounts of the substance of inadmissible testimony proffered out of the hearing of the jury but in full view of the public, and subsequently transmitted to the unsequestered jurors via the newspapers. As any trial lawyer knows, this is a problem which is faced regularly in cases of notoriety, and which has been recognized by the courts but not adequately dealt with.

Fourth: The variety of techniques used throughout the federal court system for examining jurors before and during the trial of a case that has undergone great public scrutiny has resulted in great confusion as to exactly what the proper role of the court is at these stages. What is permissible in one circuit is impermissible in another. *Compare United States* v. *Rizzo*, ——— F.2d ——— (No. 16724, 7th Cir., March 21, 1969), *and United States* v. *Accardo*, 298 F. 2d 133 (7th Cir. 1962), *with Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968). The palliative of leaving the matter to judicial discretion has generated serious judicial uncertainty in this area, and it is time for the Court to bring some order out of the existing chaos.

ARGUMENT

Federal Judges Should Be Forbidden from Publicly Lending Support to Either Side in a Pending Case, and from Making Public Press Releases Relating to Its Facts and Merits.

One of the most important areas in which the Court has exercised its supervisory powers concerns the problems posed by prejudicial news coverage and its effect on jurors. See *Marshall* v. *United States*, 360 U.S. 310 (1959). This case is an especially appropriate one for the further use of that power because of the unique involvement of a federal judge in the release of prejudicial news to the press.

As stated in *In Re Murchison*, 349 U.S. 133, 136 (1955), "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Judge Tehan's letter and its release to the press not only failed to satisfy the appearance of justice, but constituted a flagrant violation of the basic standards of neutrality and impartiality demanded of any civil-

ized court. This Court should forbid, in no uncertain terms, extra-judicial statements by a federal judge praising the character of the government's principal witness in advance of trial. The impact in this case could hardly have been greater had the trial judge himself stepped down from the bench to publicly congratulate the government's star witness upon the completion of his testimony, in full view of the jury. Moreover, Judge Tehan was the Chief Judge of the Eastern District of Wisconsin at the time, and was known to be familiar with the defendant since he had just found him guilty of and sentenced him for a tax violation. Could anyone have read the judge's letter and not believed that he spoke from a position of knowledge and authority?

The harm done by the letter's release was greatly compounded by its substance. The judge made it clear that he believed Villmow was trustworthy and entirely innocent of any criminal design, and that he "unwittingly and completely innocently" became the vehicle for the alleged bribe (R. 21, 24). But the evidence at trial established beyond question that Villmow's involvement was anything but unwitting and innocent. Villmow testified that he had received instructions for his meetings from Agent Thompson of the F.B.I. (T. 219-26), that he had lied repeately to Dr. Margoles (T. 304, 312), and that "all things that [he said] were . . . for the purpose of obtaining evidence against Dr. Margoles" (T. 310). The judge also pointed out in his letter that Villmow had performed an "outstanding example of good citizenship" and had reflected "great credit" on the city fire department, facts to which he undoubtedly would not have been permitted to testify, but which would have an obvious impact on the reading public.

If the prosecution may not release statements for publication which undermine an accused's right to a fair trial, *Sheppard* v. *Maxwell*, 384 U.S. at 363, the parallel obligations of the judiciary must be infinitely greater. Almost every venireman had read about the case in the papers. Yet even if this release was not actually prejudicial—and it is difficult to conceive how any juror reading the article would not have been strongly influenced by it—the letter plainly gave the outrageous appearance that a federal judge and the District Court itself were convinced of petitioner's guilt before trial. Even if Judge Tehan's press release was not a plain violation of due process, it still necessitates that Dr. Margoles' conviction be overturned by this Court. See *In re Murchison*, 349 U.S. at 136.

The Responsibilities of the Press and the Prosecution Must Be Better Balanced, and Greater Emphasis Must Be Placed on Restricting the Release of Prejudicial Information by the Government.

Until now, the Court has attacked the problem of prejudicial publicity by reversing convictions when the evidence indicates the defendant did not receive a fair trial. Because of the difficulty of ascertaining whether there is prejudice in any given case, it has been held that the probability of prejuidce is enough, *In re Murchison*, 349 U.S. 133 (1955), or that prejudice may be inherent in certain situations, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Turner* v. *Louisiana*, 379 U.S. 466 (1965).

The difficulty in determining the existence of prejudice is not an insurmountable obstacle to devising guidelines for use in preserving the integrity of a trial, however. While the English use of the contempt power has never been favored in this country, we are not

without the ability to limit constitutionally the government's present freedom to make press releases any way it chooses. The "trial by press" cases make one thing abundantly clear: without the cooperation and assistance of the government, most prejudicial articles containing harmful information or misinformation simply cannot be written. To effectively limit the release of such information and thereby strike a better balance between the responsibilities of the press and the government is the only answer to this problem. It is simply too much to expect the press to voluntarily suppress items of great public interest in pending criminal cases, even assuming it felt it could ethically do so and still perform its duty of keeping the public informed.

Given the pervasiveness of modern communications, the source of the prejudicial information is no longer the "basically irrelevant detail" it was in *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963). Instead, regulation at the source of prejudicial material is the only way to effectively implement *Sheppard*. To do otherwise is simply to let the matter hang in doubt and to permit defendants to be prejudiced or not, depending on the fortuitous propensities toward notoriety of local prosecutors or law enforcement officials.

This court has already exhibited its dislike for the extra-judicial information that regularly emanates from government sources.[7] *Sheppard* detailed at length the indiscretions of the government in that case. And Mr. Justice Clark, in his dissent in *Rideau*, emphasized his belief that it is not "within the province of law enforcement officers actively to cooperate in activities which tend to make more difficult the achievement of

[7] Likewise at least one Court of Appeals. See *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952).

impartial justice." 373 U.S. at 728. But such practices continue. A few courts have adopted rules dealing with the problem, but for the most part it has been ignored.[8]

As long ago as 1966, the American Bar Association, in Part 1.1 of its tentative draft of Standards Relating to Fair Trial and Free Press, recommended that law enforcement officers, from indictment through trial, not release any statements for dissemination by any means of public communication concerning criminal records or the character or reputation of the accused; the existence or contents of confessions or statements made by the accused; the identity, testimony or credibility of prospective witnesses; or the defendant's guilt or innocence, or other matters relating to the merits of the case.

Similarly, the preliminary draft (January 15, 1969) of the ABA Code of Professional Responsibility dictates that lawyers, including prosecutors, not make extra-judicial statements that a reasonable person would expect to be disseminated by means of public communication. The above mentioned rules for law enforcement officers are there also adopted for attorneys. *Disciplinary Rule 7-107.*

The government certainly violated these standards prior to petitioner's trial, particularly with its repeated praise of Earl Willmow. Whether these are the correct standards to apply, however, is not the question now. But what should be plain is that the District

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[8] See Rule 100, Rules of the United States District Court for the District of Columbia; Rules 16-18, Rules of the United States District Court for the District of Maryland. Most court rules deal only with photographing and broadcasting trial proceedings, and follow the approach of Rule 53 of the Federal Rules of Criminal Procedure.

Courts and the Courts of Appeals need guidelines to assist them in determining which pretrial news releases will be condemned and which will not. The facts of this case present a proper vehicle for such assistance.

The Publication of Testimony and Arguments Held Outside the Presence of an Unsequestered Jury Is Inherently Prejudicial and Should Be Firmly Condemned.

The dangers to an unsequestered jury in a case of great notoriety are obvious. Nearly all the Margoles jurors confessed to having read of the case prior to trial, and although the court gave the usual cautionary instructions not to read or discuss the case,[9] one juror admitted having read newspapers in the jury room, effectively dispelling the fantasy that the jurors were insulated from press accounts of the trial.

On the fourth day of trial the newspapers and television stations carried the substance of a proffer of the very damaging testimony of one Wendelin Kraft, who alleged that petitioner had also approached Kraft about using his influence with Judge Tehan. This testimony had been ruled inadmissible that day in a hearing outside the jury's presence. The media also carried accounts of the denial of a defense motion for acquittal on the ground of entrapment, also made out of the jury's hearing. The following morning the court simply asked the jurors collectively whether they had read or heard about the case the previous evening. The jurors responded with silence, and that concluded the matter (T. 697).

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[9] "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

There is no doubt that the public has a right to be informed of the course of judicial proceedings. This Court must determine, however, whether that right extends to the publication of proceedings held outside the hearing of the jury. Although the public is generally permitted to be present at such hearings, the newspapers differ markedly from the general public because they have a duty to report to the public. The reading public may at such times, as a practical matter, include unsequestered jurors. While cautionary instructions have been the traditional "remedy" for this problem, *Marshall* v. *United States,* 360 U.S. 310 (1959) has recognized their inadequacy. In that case, jurors had read news accounts of inadmissible testimony and the conviction was reversed, notwithstanding the jurors' assurances that they would not be influenced by the articles and that they could decide the case only on the evidence of record.

It is simply too much to ask a juror to go home in the evening and refrain from reading about a case that has captured the public's interest. Part 3.5(d) of the ABA fair trial-free press standards recognizes this, and suggests that the public be removed or cautioned against publicizing such proceedings prior to the verdict. This is a small price to pay to insure the substance and not just the facade of a fair trial. The district courts should be given firmer guidelines on precisely what their duties are in controlling publicity of such proceedings during trial. It is no answer to permit the newspapers to publish at will, and then to decide after the fact whether the defendant has been prejudiced. Determining the likelihood of the existence of prejudice is difficult enough, and should be simplified by establishing rules on what the media can and cannot do. The fact that there may be a clash between the

First and Fifth amendments in this area is no excuse for inaction if the march of "trial by press" cases to appellate courts is to end.

The Court Must Lay Down Standards To Dispel the Present Confusion Among Circuits in Respect to Examination of Jurors Before and During Trial.

The voir dire examinations prior to and during trial are likely to be the most important part of any criminal proceeding that has been saturated with pretrial publicity. When jurors are improperly screened, the cornerstone upon which a fair trial rests is effectively removed. Yet the mode of examining jurors in the federal courts varies greatly, and the methods are often patently inadequate.

For example, in *Coppedge* v. *United States,* 106 U.S. App. D.C. 275, 272 F.2d 504 (1959), *cert. denied,* 368 U.S. 855 (1961), the District of Columbia Circuit held that jurors examined during trial about whether they have read potentially prejudicial news articles must be examined individually and out of the presence of the other jurors. The same rule has been adopted by the Ninth Circuit in a carefully prepared opinion by Judge Barnes, *Silverthorne* v. *United States,* 400 F.2d 627 (9th Cir. 1968). These procedures were not followed in Dr. Margoles' case, the jurors being asked only the most pro forma and perfunctory questions about the Wendelin Kraft testimony.

The rule appears to be different in the Second and Eighth Circuits where collective negative responses of jurors are considered adequate. *United States* v. *Feldman,* 299 F.2d 914 (2d Cir.), *cert. denied,* 370 U.S. 910 (1962); *Smith* v. *United States,* 236 F.2d 260 (8th Cir.), *cert. denied,* 352 U.S. 909 (1956). The

Seventh Circuit seemed to have at first embraced the *Coppedge* rule in *United States* v. *Accardo,* 298 F.2d 133 (7th Cir. 1962), but now appears to have conclusively abandoned it in *United States* v. *Rizzo,* —— F.2d —— (No. 16274, 7th Cir., March 21, 1969).

The same divergence exists in regard to the voir dire examination prior to trial. Several circuits have held that at that point in the case, absent an examination designed to elicit answers which provide an objective basis for the court's *own* evaluation, "merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]." *United States ex rel. Bloeth* v. *Denno,* 313 F.2d 364, 372 (2d Cir.), *cert. denied,* 372 U.S. 978 (1963); *accord, Silverthorne* v. *United States,* 400 F.2d 627 (9th Cir. 1968). In this case, however, the Seventh Circuit affirmed the District Court notwithstanding that nearly all the jurors had read of the case prior to trial; that they were asked only the most general questions as to whether they could fairly try the case; that the court never ascertained what they had read; and that the court made no attempt to independently evaluate the jurors' ability to try the case fairly, accepting instead their subjective statements that they could, or their silence.

Regardless of what might be the best procedure in such cases, there is no logical reason why the circuits should have such widely differing rules for voir dire where the danger of prejudice exists. The ABA has recognized this, and has suggested that whenever there is a question of possible prejudice, either before or during trial, each juror or venireman should be examined outside the presence of the others so the court can determine what he has read and heard and how the

exposure has affected his attitude.[10] The voir dire in petitioner's case was a group procedure, and as this Court has already recognized, "each juror was sincere when he said that he would be fair and impartial . . . but psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961).

The area is woefully in need of workable standards. It is a technical area to be sure, but one in which the evenhanded administration of justice dictates a general rethinking and a departure from the philosophy that each case depends on its special facts. *Marshall* v. *United States*, 360 U.S. 310, (1959).

This case is an excellent vehicle for dealing with this issue, since the prejudicial effect of the news coverage upon the jurors was reinforced by the court's erroneous instruction on the defense of entrapment. The burden is on the government to prove beyond a reasonable doubt that the defendant was not induced to commit the offense, but was predisposed or ready to do so. Where the record presents a close question of guilt or innocence, the failure to so instruct is prejudicial. *United States* v. *Landry*, 257 F.2d 425, 430 (7th Cir. 1958). That this record presents a close question is evidenced by the verdict of not guilty on the related bribery charge.

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[10] Project on Minimum Standards for Criminal Justice, American Bar Association, Standards Relating to Fair Trial and Free Press, Tentative Draft (1966), §§ 3.4(a), 3.5(f).

CONCLUSION

In the *Wall Street Journal* of February 20, 1967, one United States attorney in Milwaukee, conceding the indiscretions in dealing with the press in the *Margoles* case, noted, "We could never get away with anything like that today." Hopefully, he will be proved correct. This case presents the opportunity to finally pave a road along which the press, the courts, the prosecution, and the defendant can travel together in harmony. The Courts of Appeals and the government, in this case and others, have either ignored or misunderstood the lesson this Court sought to teach in its landmark decision in *Sheppard*. Even less has there been an understanding of the vital interrelation between the First and Fifth Amendments in the free press-fair trial context.

Petitioner therefore respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals in this case so that justice may at last be done.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16812

MILTON MARGOLES, *Petitioner-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

[March 4, 1969]

Appeal From the United States District Court for the Eastern District of Wisconsin

Before CASTLE, Chief Judge, and FAIRCHILD and CUMMINGS, Circuit Judges.

CASTLE, Chief Judge.

This appeal arises from the denial by the district court of petitioner's motion to vacate his sentence, under 28 U.S.C. § 2255. Petitioner was convicted in 1960 of attempting to obstruct justice and unlawfully influence a federal officer, in violation of 18 U.S.C. § 1503. The case arose out of an alleged attempted bribe of a federal judge who had previously sentenced petitioner to a one-year prison term after a plea of *nolo contendere* to charges of income tax evasion.[1] Petitioner's conviction for obstructing justice was affirmed by this court in United States v. Margoles, 294 F.2d 371 (7th Cir. 1961), in which the issues presented on this appeal were not raised.

Specifically, those issues concern petitioner's contention that because of widespread prejudicial publicity regarding the alleged bribery, he was denied his constitutional right

[1] Petitioner was acquitted by the jury of a bribery count contained in an earlier indictment involving the same set of facts.

to a fair trial. The main question centers around the conduct of the trial judge, toward the prospective and chosen jurors, in taking precautions against the effect of the publicity, both before and during the trial.

Petitioner's defense at trial was entrapment. Thus, the issue presented to the jury turned on the question of whose version of the transaction was to be believed—petitioner's or the Government's chief witness. The jury returned a verdict of not guilty on the bribery count and guilty on the other two counts. Petitioner has served the two concurrent five-year sentences imposed by the district court and his parole expired on October 20, 1966.

Since the existence of prejudicial publicity both before and during the trial present different legal issues, we shall discuss each separately.

I. Pretrial Publicity

The pretrial publicity consisted mainly of twenty-four different articles in Milwaukee's two major newspapers, which appeared on sixteen separate days on either the front page or the "second front page."[2] The combined circulation of these two newspapers reaches the great majority of households in Milwaukee County, where the trial was held. Comparable radio and television coverage is also alleged by petitioner.

Petitioner contends that most of the newspaper articles were harmful to him, that many were inaccurate, and that Government officials assisted the press in obtaining the information used in the articles. Perhaps the primary example of prejudicial pre-trial publicity cited by petitioner is contained in two articles which concerned a letter, made public by the judge who was the object of the attempted bribe, praising the informer who, according to the judge, "unwittingly and innocently became the vehicle for the

[2] The first page of the local news section.

alleged attempt by Dr. Milton Margoles to bribe" the judge. This article and the letter on which it was based, petitioner claims, destroyed the defense of entrapment, which was petitioner's only defense presented at trial.

Petitioner's counsel did not move for a continuance on the basis of the publicity, although a continuance was requested on other grounds. The trial court, however, began its handling of the case on the assumption that there was possible prejudicial publicity. Although most of the newspaper articles appeared some time before the trial began, the response of some of the veniremen indicated that the publicity surrounding this case was in fact known to at least some of the prospective jurors. Assuming for purposes of this opinion that prejudicial publicity was present, the question before us is whether the procedures employed by the trial court adequately protected petitioner's right to a fair trial.

Petitioner contends that the district court "did virtually nothing to safeguard the accused's constitutional right to have his guilt or innocence determined by an unbiased jury." We strongly disagree. The record discloses that the trial court thoroughly instructed and questioned the jurors on the effect of the publicity. During the *voir dire* examination, the court began by stating:

> "It may be that you have read in the newspapers, or heard on the radio, or perhaps even on television, about this that we are now starting; or learned something about it through conversation with other people. If you have, as a result of such newspaper reports, radio or television broadcasts, or conversations with others * * * formed any opinion or expressed any opinion whatsoever regarding the guilt or innocence of the defendant, you should so indicate. In other words, I will put this question again to you: If, as the result of newspaper reports, radio or television broadcasts, or conversations with others, you * * * formed any opinion or expressed any opinion whatsoever regarding the guilt or innocence of the defendant, Milton Margoles,

you should so indicate. * * * I am not indicating by that question that you are disqualified if you formed any opinion with regard to the guilt or innocence of the defendant as a result of what you may have read or heard about this case. I am only asking now whether or not you have formed or expressed any opinion on the subject matter."

After further explanation by the court, some veniremen responded that they had read about the case. All but one of these were ultimately excused from jury duty. That one, Mr. Dix, was examined by the court and later by defense counsel. The following dialogue took place between the court and Mr. Dix:

"The Court: In other words, you wouldn't let any views you have heretofore had in your mind about this case—you would not permit that to interfere with your fairness and your impartiality as a juror?

* * * * * *

Mr. Dix: I think so.

* * * * * *

The Court: Regardless of what you may have read?
Mr. Dix: Yes.
The Court: What you thought, or the reactions which you had from the newspaper reports, or any information you got about this case, you could remove that and decide this case on the basis of the evidence and the law that you hear in the courtroom?
Mr. Dix: Yes.
The Court: Any question about it in your mind?
Mr. Dix: No."

There then followed more extensive instructions and questions by the court, including a strong, thorough statement on the presumption of innocence. Similar statements were later made by defense counsel. From the responses given by some of the veniremen, there does not appear to have been any hesitance on their part to answer frankly and candidly. Indeed, both the court and counsel commendably created an atmosphere conducive to honest admissions

by the jurors. Those who admitted that they had formed a prejudicial opinion about the case were excused and defense counsel voiced no objection to either the method of examination or to the jurors who were finally selected.

We hold that the procedures employed by the district court at the *voir dire* examination of prospective jurors were adequate to safeguard petitioner against the effect of prejudicial pre-trial publicity, protected his right to a fair trial, and met the standards set by the Supreme Court and by this Court in dealing with similar cases.

In Irvin v. Doud, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), the Supreme Court, in a case involving prejudicial pre-trial publicity, set out the applicable standards:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Spies v. [People of State of] Illinois, 123 U.S. 131 [8 S.Ct. 21, 31 L.Ed 80]; Holt v. United States, 218 U.S. 245 [31 S.Ct. 2, 54 L.Ed. 1021]; Reynolds v. United States, supra [98 U.S. 145, 25 L.Ed. 244].
>
> "The adoption of such a rule, however, cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. Lisenba v. [People of State of] California, 314 U.S. 219, 236 [62 S.Ct. 280, 290, 86 L.Ed. 166]. As stated in *Reynolds*, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise

the presumption of partiality. The question thus presented is one of mixed law and fact * * *.' At page 156 [of 98 U.S.]. 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * *. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' At page 157 [of 98 U.S.]. As was stated in Brown v. Allen, 344 U.S. 443, 507 [73 S.Ct. 397, 446, 97 L.Ed. 469], the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors." 366 U.S. at 722-723, 81 S.Ct. at 1642.[3]

The Supreme Court found that the *voir dire* examination showed a pattern of deep and bitter prejudice throughout the community. Ninety percent of the 430 prospective jurors "entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty." 366 U.S. at 727, 81 S.Ct. at 1645. Eight out of the twelve jurors finally empaneled thought Irvin was guilty. Under these and other factors present, including the fact that defense counsel had exhausted his maximum of 20 peremptory challenges, the Court found that a presumption of partiality was affirmatively established.

In the instant case, however, only a few prospective jurors had read about the case and formed any opinion and only one of these was empaneled, without objection, on the jury. His extensive questioning, as well as that of all the veniremen, seemed to satisfy both the court and counsel as to his and the rest of the jury's impartiality. Moreover, petitioner did not exhaust his peremptory challenges.

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[3] See also United States v. Hoffa, 367 F. 2d 698, 710-711 (7th Cir.1966), remanded on other ground, 387 U.S. 231, 87 S.Ct. 1583, 18 L.Ed.2d 738 (1967).

Therefore, under the standards set out in Irvin v. Dowd, our independent evaluation of the *voir dire* testimony discloses nothing which would raise a presumption of partiality in any of the jurors. The thorough *voir dire* examination conducted by both the court and counsel adequately protected petitioner's right to be tried by a jury composed of unbiased, impartial jurors.

Petitioner also argues that the trial court's failure to control the release of pre-trial prejudicial information, grant a continuance, change venue, or empanel veniremen from a distant part of the judicial district was reversible error. Since such action was not requested by counsel, petitioner apparently argues that the court should have raised these questions *sua sponte*. Petitioner places heavy reliance on Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) in his argument on these points. We agree that *Sheppard* is an important case in this area, but do not believe that it compels reversal in the instant case. While most of the *Sheppard* opinion is devoted to the effects of prejudicial publicity and conduct occurring during the trial, some of the language applies to pre-trial publicity as well.

[4] Thus, while the *Sheppard* decision discusses the methods which, in that case, should have been employed by the trial court to control the release and publication of abusive publicity, 384 U.S. at 361, 86 S.Ct. at 1521, the Court was referring only to publicity occurring after judicial proceedings had begun. Obviously, a court is powerless to control news coverage occurring before it has any jurisdiction or before such coverage can be brought to its attention. We refuse to hold a court to such a meaningless and impossible standard as advanced by petitioner.

Regarding the denial of a continuance, it must be noted that the continuance was requested on other grounds which are not contested on this appeal.[4] If counsel believed

[4] Moreover, two previous continuances had been granted.

that the publicity was dissipated sufficiently by the time of trial so that a *voir dire* examination could weed out any undesirable jurors, the court should not, except in the most extreme circumstances, be expected to raise the issue of a continuance *sua sponte*. *Sheppard* does not differ with this conclusion. It held that the trial court should have raised the issue of jury sequestration and possibly control of publicity *sua sponte*, 384 U.S. at 363, 86 S.Ct. at 1522, but did not imply that in all cases involving pre-trial publicity the court necessarily must raise or invoke, *sua sponte*, all protective measures. Of course in *Sheppard*, motions for a continuance and for a change of venue were expressly made by counsel and thus were dealt with on that basis. However, while we do not believe that justice should take a role secondary to the adversary process of criminal law, we cannot hold that a trial judge is required to raise all questions concerning the necessity for protective measures. Therefore, as here, in the absence of unusual circumstances, motions for such measures as petitioner advocates in the case at bar must be made by the defendant or his counsel.

[7] Petitioner's final argument regarding pre-trial publicity is that the prospective jurors should have been examined individually at the *voir dire* examination. Besides the fact that petitioner did not request such an examination, there is no authority for this contention. Indeed, especially in a case involving a large number of prospective jurors,[5] such a procedure would be overburdensome and would probably provide no greater protection than the procedures employed in the instant case. As previously pointed out, the jurors in the case before us did not seem inhibited by the fact that the other veniremen were present. It seems equally plausible that the average layman would become inhibited if he were called individually into the chambers of a federal judge as he would in the presence of his peers. Therefore, we hold that individual questioning of venire-

[5] In the instant case, 45 veniremen were sworn.

men on pre-trial *voir dire* examination was not required here.

II. Publicity During the Trial

In all but two instances, the news coverage of petitioner's trial merely reported the factual details of the proceedings, including testimony of witnesses. However, on the second day of the trial the Milwaukee Journal published the names, ages, and addresses of the jurors; and on the fourth day of trial the same newspaper published the substance of the testimony of one Government witness, given outside the jury's presence, which was held inadmissible by the district court.

Petitioner's first contention under this point is that the trial court committed error by failing to sequester the jury and the witnesses, and in failing to caution or control the press and the parties in the release of prejudicial news coverage. Again, the most important recent case in this area is Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), in which the court held that the trial judge should have raised the issue of sequestration *sua sponte* and that "the courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." 384 U.S. at 363, 86 S.Ct. at 1522. Under the facts present in the instant case, the procedures required by the Supreme Court in *Sheppard* are inapplicable.

We do not suggest that the *Sheppard* case should be strictly confined to its facts. It is important to note, however, that the facts of that case disclose some of the most abusive and prejudicial news coverage of a criminal trial in modern judicial history. The publicity was overwhelming in both quantity and prejudicial content, and it continued for months up to and during the trial itself. The news media went far beyond their reporting function and called upon public officials, the judge, and the jury to convict the defendant in the name of "justice." Moreover,

the many appeals to the trial court brought by defense counsel to take steps to protect the defendant's right to a fair trial were all but ignored by the trial judge (who, along with the prosecutor, was running for judicial office at the time). Motions for change of venue on the ground of prejudicial publicity were denied, as were motions for mistrial and continuance. In addition, the judge refused defense counsel's numerous requests to ask the jurors if they had read or heard any of the news coverage, and to ascertain the effect it had on them. The actual content of the publicity was aggravated in its prejudicial effect by the trial court's allowing the press "free rein" of the courtroom, including the "unprecedented" conduct of allowing numbers of reporters inside the bar of the court itself. 384 U.S. at 355, 86 S.Ct. at 1518.

Because of these events the Supreme Court held that the trial court should have insulated the trial from much of the publicity by various means, including: restricting use of the courtroom by newsmen (as defense counsel had requested); limiting the number of reporters in the courtroom, whose presence disrupted the trial; forbidding the presence of reporters inside the bar of the court, which destroyed the defendant's right to talk in privacy with his counsel; instructing witnesses, parties and especially government officials not to discuss the case with newsmen; and warning newspapers to check the accuracy of their accounts of the testimony.

In the instant case, however, most of the news coverage ended some time before the trial took place. Most of the stories merely related—albeit somewhat one-sidedly—the facts of the case, and none called for public vengeance. Moreover, and most importantly, the district judge affirmatively responded to counsel's suggestions as to how to protect petitioner from prejudicial news coverage. He strongly and repeatedly admonished the jury throughout the trial not to read or listen to any news coverage of the case and not to discuss it with anyone.

Thus, although the *Sheppard* case should not be strictly confined to its facts, it does not suggest that courts should sequester the jury or witnesses, *sua sponte*, in every case involving prejudicial publicity. Nor does *Sheppard* hold that trial courts must take strong measures against the press or the parties in every such case. Rather, we read *Sheppard* as holding that the courts should not passively allow gross abuses by the news media in the guise of "freedom of the press." The Supreme Court recognized that "justice cannot survive behind walls of silence." The Court stated that it has been unwilling "to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.'" (citing Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947)). Thus, "where there was no threat or menace to the integrity of the trial" the courts should refrain from controlling news coverage of a case; but when such threat arises, the court should take appropriate steps to protect its integrity. 384 U.S. at 349-350, 86 S.Ct. 1515-1516. The nature of the measures taken by the trial court should, therefore, depend upon the severity of the threat to the integrity of the trial. Each case must, of course, be decided on its own facts. United States v. Largo, 346 F.2d 253, 256 (7th Cir. 1965); United States v. Accardo, 298 F.2d 133, 136 (7th Cir. 1962).

On this basis, we hold that those threats arising in the instant case were adequately dealt with by the district court and that sequestration of the jury and control of the press were not, therefore, required. The first such threat involved the publication of the names and addresses of the jurors, resulting in most of them receiving anonymous mail during the trial, which concerned the case. After extensive, individual questioning of each juror and alternate, a motion for mistrial was made by petitioner's counsel, and was denied. Since the denial of this motion is not alleged as error on this appeal or in the petition before the district court, we need not consider it. We do note,

however, that a reading of the transcript of the proceedings discloses that all the jurors took their duty very seriously and ignored the anonymous letters they received.

The only other threat to the integrity of the trial was the publishing of the inadmissible testimony on the fourth day of trial. There is no doubt that such publication was an abuse of power by the press and should be condemned. The jury's verdict must be based on evidence received in open court, not from outside sources, Sheppard v. Maxwell, 384 U.S. 333, 351, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and the exposure of jurors, through news accounts, to information which was not admitted at trial may be grounds for reversal. Marshall v. United States, 360 U.S. 310, 313, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959). Therefore, once the existence of a news account of inadmissible evidence is brought to the attention of the trial court, as was done in the instant case, the court is required to take appropriate steps to insure that the jurors had not been exposed to or prejudiced by such accounts.

The issue presented in the case at bar, therefore, is whether the steps taken by the district court were appropriate. Specifically, petitioner contends that the court should have examined each juror individually and outside the presence of his fellow jurors, rather than conducting the inquiry on a collective basis. We disagree.

In the instant case, defense counsel brought the articles and broadcast to the court's attention and made the following motion: "My motion is, if the court please, to examine the jurors and ask each one *or all collectively* whether any of them read anything in the newspapers regarding any proceedings that took place outside of the presence of the court. * * *" (emphasis ours). The court granted this motion and stated to the jury:

> "Ladies and gentlemen, I have given you certain admonitions. I am going to ask you three questions, and they are going to be collective. However, I would like to have you understand that these questions that

I ask are directed to each of you individually, so when I ask the question it will be a question that you will answer individually.

"I think I should preface my questions by saying this: By my asking these questions, I do not wish to imply anything except to ask the questions and except that I assume and will understand that you are answering the questions truthfully. As to the significance of your reply, that is something that you need not speculate upon.

"The first question that I would like to ask is this: Did any of you read any news item which appeared in the Milwaukee Journal last evening relating to this case? And I have particular reference to the one-sheet part of the Journal which is of orange color. Did any of you read that news item? I understand that there is no one who says that he did. I am right in that question, I believe, the way you are now answering.

"Second, did any of you read any news item appearing in the Milwaukee Sentinel relating to this case which appeared in this morning's paper? By your silence, I understand that you did not.

"The third question, did any of you see the newscast on Channel 4, Milwaukee, last evening? By your silence, I understand that you did not.

"Thank you, ladies and gentlemen, for your answers."

There was no objection by counsel to this procedure and, in fact, it was precisely what counsel had asked for in his motion. Although petitioner now claims that the inquiry should have been made of each juror individually, we hold that the collective questioning was proper.

In United States v. Accardo, 298 F.2d 133, 136 (7th Cir. 1962), this court reversed the defendant's conviction, partly on the basis of inadequate protection of the defendant's right to a fair trial due to prejudicial publicity. The court held that frequent admonitions to the jury calling "the

attention of the jurors *specifically* to the possibility of newspaper accounts * * *" were required. As we have already noted, such admonitions were frequently given in the instant case.

The *Accardo* decision went on to hold that the trial judge "should have, by the careful examination of each juror, out of the presence of the others, determined the effect of the articles on those who had read them and whether they discussed the articles with others." 298 F.2d at 136. This court in United States v. Largo, 346 F.2d 253, at 256 (7th Cir. 1965), in commenting upon *Accardo*, stated that "the better practice is to interview each juror singly out of the presence of all of the other jurors"; but *Largo* went on to hold that since the issue of guilt or innocence was not close, there was no prejudicial error committed.

Thus, the procedure required by this Circuit where prejudicial publicity is brought to the court's attention during a trial is that the court must ascertain if any jurors who had been exposed to such publicity had read or heard the same. Such jurors who respond affirmatively must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity. However, if no juror indicates, upon inquiry made to the jury collectively, that he has read or heard any of the publicity in question, the judge is not required to proceed further. We therefore find that the district court took adequate precautionary measures to protect petitioner's right to a fair trial.

Since no other publicity was brought to the trial court's attention, and since the court must be notified of any offensive publicity before it can be required to take the necessary precautions, we find no further area of contention regarding prejudicial publicity in the instant case.

Petitioner's last contention, that the trial court improperly instructed the jury as to burden of proof, is without merit since the instruction in question was not

objected to below and since this issue is improperly raised on a collateral attack under § 2255. See United States v. Jonikas, 197 F.2d 675, 676 (7th Cir. 1952), Campbell v. United States, 355 F.2d 394 (7th Cir. 1966).

For the foregoing reasons, the judgment below is affirmed.

Affirmed.

Opinion of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 67-C-261

MILTON MARGOLES, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

OPINION AND ORDER DENYING MOTION

This is a motion by the plaintiff, Milton Margoles, under §§ 2255 and 1651, Title 28 United States Code, for an order vacating the judgment of conviction and sentence imposed on him in connection with Case No. 60-CR-105 on October 24, 1960. Margoles asserts that he was deprived of a fair trial by massive and prejudicial publicity before and during the trial. Included and made a part of the Margoles motion was a brief and exhibits consisting of thirty-seven photographic copies of pages of Milwaukee newspapers along with a request for an evidentiary hearing on the motion. In addition to the facts and reasons asserted by Margoles, he stated that "other" reasons would be asserted at an evidentiary hearing.

The Government filed a "Memorandum in Opposition to Motion to Vacate Judgment and Sentence" which also included excerpts from the transcript of the trial.

Background

On October 3, 1960, a jury trial of Margoles was commenced with the Honorable Luther M. Swygert presiding. This was a trial of two consolidated cases. In the first case (No. 60-CR-83) Margoles was charged with offering a thing of value to a federal judge intending to influence him, in violation of 18 U.S.C. § 206. The jury found him "not guilty" of this offense. In the second case (No. 60-CR-105) he was charged with attempting to corruptly influence a federal judge and attempting to obstruct the due administration of justice, in violation of 18 U.S.C. § 1503. The jury found the defendant "guilty" of both of these counts.

On October 24, 1960, Margoles was sentenced to two concurrent terms of five years and fined $5,000.

Publicity Was Not Massive

Margoles claims that the newspaper coverage of his case was "massive." This court has thoroughly studied the thirty-seven photographic copies of the newspaper pages submitted with the motion. Certainly the Margoles case was the subject of publicity. Newspaper articles appeared for three days following the return of the indictment in Case No. 60-CR-83 on July 15, 1960.[1] Articles also

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[1] Articles submitted:

July 15, 1960—Milwaukee Journal, "Latest Edition," Pages 1 and 19.
July 15, 1960—Milwaukee Journal, "Peach" Sheet.
July 16, 1960—Milwaukee Sentinel, Early Edition, Page 1.
July 16, 1960—Milwaukee Sentinel, Later Edition, Pages 1 and 16.
July 16, 1960—Milwaukee Journal, "Latest Edition," Page 1.
July 17, 1960—Milwaukee Sentinel, Early Edition, Page 3.
July 17, 1960—Milwaukee Sentinel, Later Edition, Page 3.
July 17, 1960—Milwaukee Journal, Part 2, Pages 1 and 2.

appeared for eight days during his trial which lasted from Monday, October 3, 1960, to October 11, 1960.[2]

The newspapers did not consistently give the Margoles case front page coverage. The articles often appeared in the second section of the newspapers. The Margoles case received the major headline in the Milwaukee Journal only once. That headline appeared only after the jury had returned its verdict. The news stories which were used in the later editions were most often substantially the same as had appeared in the earlier editions. This court is convinced that the news coverage was not massive in any sense of the word. The publicity the Margoles trial received was no more than ordinary press coverage of a newsworthy event. The volume of publicity was certainly not comparable to that found in the case of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

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[2] Articles submitted:

October 3, 1960—Milwaukee Journal, Part 2, Pages 1 and 7.
October 4, 1960—Milwaukee Sentinel, Page 1.
October 4, 1960—Milwaukee Journal, "Latest Edition," Pages 1 and 8.
October 4, 1960—Milwaukee Journal, "Peach" Sheet.
October 5, 1960—Milwaukee Journal, Part 2, Page 3.
October 5, 1960—Milwaukee Sentinel, Part 2, Page 1.
October 6, 1960—Milwaukee Sentinel, Page 8.
October 6, 1960—Milwaukee Journal, Part 2, Page 2.
October 6, 1960—Milwaukee Journal, "Peach" Sheet.
October 7, 1960—Milwaukee Sentinel, Page 10.
October 7, 1960—Milwaukee Journal, "Latest Edition," Pages 1 and 3.
October 7, 1960—Milwaukee Journal, "Peach" Sheet.
October 8, 1960—Milwaukee Sentinel, Part 2, Page 1.
October 8, 1960—Milwaukee Journal, Page 7.
October 10, 1960—Milwaukee Journal, "Latest Edition," Pages 1 and 4.

(Other articles were published after the case had gone to the jury.)

PUBLICITY WAS NOT PREJUDICIAL

Margoles also claims that the newspaper articles often detailed all of his past difficulties and quoted government sources which, he alleges, emphasized the charges and evidence against him. As evidence that the jury was prejudiced, the Margoles brief quoted the jury foreman as saying:

> "No, there was no mention [of it] at all that I know of, not in the section [that] I sat in. As soon as I went in, *I read the paper . . .*" (Emphasis supplied in the brief.)

This quotation is from page 806 of the trial transcript. The juror's statement was part of an answer made to the Court's questioning concerning the receipt of some inflammatory reading material apparently sent anonymously through the mail to some of the jurors. The answer does not indicate which newspaper the juror apparently read or whether there were any articles concerning Margoles in it. Another portion of the juror's answer to the Court's questioning indicates that the juror realized and intended to live up to his duty as a juror. Speaking of the material sent through the mail, the juror said:

> "* * * 'Gosh,' I says, 'I don't know what this is about, but I surely don't want to disqualify myself by reading this,' * * *." (Trial transcript, page 804.)

The petitioner cites the Sheppard case as authority for the proposition that his 5th and 6th amendment rights were violated. Assuming that all of the petitioner's factual allegations are true, this Court finds that his allegations are insufficient to come under the doctrine of the Sheppard case.

The publicity given the Margoles trial was not only less than massive, but certainly could not be characterized as a "highly prejudicial supplementation of the trial record" as was found in the Sheppard case. The court in *Sheppard*

v. *Maxwell,* 384 U.S. 333 (1966), pointed out at page 354 that:

> "* * * For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. * * *"

The files and records of the Margoles cases indicate no such prejudicial setting for the trial.

The trial judge in the Sheppard case actually ruled that the court lacked power to control the publicity about the trial. The carnival atmosphere at the Sheppard trial was simply not present at the Margoles trial. The Margoles trial jurors were not thrust into the role of celebrities as were the jurors in the Sheppard case. The very "judicial serenity and calm" of which Sheppard was deprived was accorded to Margoles at his trial.

The trial judge in the Sheppard case merely gave "suggestions and requests" to the jury concerning the undesirability of reading or listening to the news coverage of the case. Judge Swygert, however, gave the jurors strong admonitions to refrain from reading, watching, or listening to any news coverage of the Margoles case. These admonitions were repeated many times during the trial. The following are quotations from the trial record of the Margoles case:

> October 3, 1960
> Noon Adjournment
> Transcript Pages 22-23
> (Addressed to all prospective jurors.)
>
> "I want to say this now: —I will say it again, but I want to say this now to all of you. While you have not been selected as jurors you are something other than a citizen who has connection with the court or with this case. In other words, you are here as prospective jurors to try this case and as prospective jurors, even though you haven't any of you been finally selected, I ask that you not discuss this case with anyone

during the noon hour or at any time if you are selected finally while you are trying the case. But as you now are prospective jurors, I ask that you absolutely not discuss this case with anyone, not permit anyone to discuss it in your presence, and if anyone should attempt to discuss it would you report that immediately to the court.

"I ask again and I admonish you to talk about this case to no one. Don't read the newspapers about it. If there are any late stories about it, don't read any newspapers or hear any broadcasts or see any television, and permit no one to discuss this case with you."

October 7, 1960
Adjournment to October 10, 1960
Transcript Pages 745-747

"I would like to again remind you, and I want you to keep this, what I say to you and what I have said to you before, constantly in your minds: Not permit anyone to discuss this case with you, not permit anyone to discuss it in your presence, discuss this case with no one. I ask that you not read about it, not learn anything about it from radio, television, or the newspapers. You should decide this case only on what you have heard here this week in this courtroom; and you would not be conscientious jurors, true to your oath, unless you followed this instruction. And I say this even with regard—and I have told you before, in discussing it at home, as you know you are apt to invite or get impressions or views from others no matter with whom you discuss it, so this request and admonition not to discuss the case applies even in your own homes. Keep an open mind. You have not got the case for decision yet. When I say 'keep an open mind,' not reach any final conclusion in your own minds about this case until you have had the benefit of the final arguments of counsel, the Government counsel and the defense counsel, until you have had the instructions from the court. It will then be time enough for you to make up your minds individually and collectively as to the guilt or innocence of the defendant.

I repeat, do not discuss this case with anyone, do not permit anyone to discuss this case with you, and if anyone should attempt in any way to communicate with

you about this case (1) Refuse to discuss this case and report this immediately to me, to the Judge.

"Now, I ask you, ladies and gentlemen, because of the week end, to keep these admonitions constantly in mind, and to follow them out faithfully, and if you do then you will be true to your oath as conscientious jurors, and true to your duty as conscientious jurors, and if you should fail to do that you would not be true to your oath as jurors and as a part of this court. Of course, retain as much as humanly possible all of the evidence you have heard here this week, keep constantly in mind that evidence because it will be that evidence you will have to have in mind when you decide this case. So try to retain it in your mind; but, as I repeat, do not reach any final conclusion in your mind until you have the case for submission, all of these instructions and admonitions I have given you."

October 7, 1960
12:15 P.M.
Transcript Pages 696-697

"I think I should preface my questions by saying this: By my asking these questions, I do not wish to imply anything except to ask the questions and except that I assume and will understand that you are answering the questions truthfully. As to the significance of your reply, that is something that you need not speculate upon, and I don't want you to speculate upon the significance or the consequences of your reply.

"The first question that I would like to ask is this: Did any of you read any news item which appeared in the Milwaukee Journal last evening relating to this case? and I have particular reference to the one-sheet part of the Journal which is of orange color. Did any of you read that news item? I understand that there is no one who says that he did. I am right in that question, I believe, the way you are now answering.

"Second, did any of you read any news item appearing in the Milwaukee Sentinel relating to this case which appeared in this morning's paper? By your silence, I understand that you did not.

"The third question, did any of you see the newscast on Channel 4, Milwaukee, last evening? By your silence, I understand that you say that you did not.

"Thank you, ladies and gentlemen, for your answers."

These instructions and the others that appear in the transcript are clear and unambiguous admonitions designed to inform and impress the jury with the duty to decide the case only on the basis of the evidence presented. This court is convinced that the instructions had that intended effect upon the jury.

The factual allegations of the petition give no reason to doubt that the verdict was based upon the evidence developed at the trial.

The conclusion that the jury reached its verdict unaffected by alleged news-media-inspired prejudice is further supported by the fact that Margoles was found "not guilty" of the offense of offering a thing of value to a federal judge intending to influence him.

The facts alleged by the petitioner are simply insufficient to raise a doubt about the fairness of the trial. The files and records of the Margoles cases conclusively show that the petitioner is entitled to no relief under § 2255 of Title 28 United States Code. Consequently this court did not order an evidentiary hearing. This procedure is authorized where no issue of fact appears. *Yates* v. *United States*, 316 F.2d 718, 721 (10th Cir. 1963); *Mitchell* v. *United States*, 359 F.2d 833 (7th Cir. 1966); *United States* v. *McNicholas*, 298 F.2d 914 (4th Cir. 1962), cert. denied 369 U.S. 878; and *Tweedy* v. *United States*, 276 F.2d 649 (9th Cir. 1960).

For the foregoing reasons,

IT IS ORDERED that petitioner's motion to vacate judgment and sentence in this case must be and the same hereby is denied.

Dated at Milwaukee, Wisconsin, this 29th day of December, 1967.

JOHN W. REYNOLDS
U.S. District Judge

Order of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 67-C-261

MILTON MARGOLES, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ORDER DENYING MOTION

On January 8, 1968, petitioner filed a "Motion to Reconsider and Set Aside Order Denying Motion to Vacate Judgment and Sentence." On January 24, 1968, the respondent filed a response to said motion.

The petitioner has added sixteen photographic copies of newspaper articles which appeared in the Milwaukee newspapers prior to petitioner's conviction. The petitioner emphasizes that these sixteen articles are in addition to the thirty-seven articles which were submitted as part of the previous motion to vacate judgment and sentence.

This court has completely reviewed the motion to reconsider as well as the entire file, and being fully advised in the premises;

IT IS ORDERED that petitioner's motion to reconsider and set aside the motion to vacate judgment and sentence be and the same is hereby denied.

Dated at Milwaukee, Wisconsin, this 26th day of February, 1968.

JOHN W. REYNOLDS
U.S. District Judge

APPENDIX B

Constitution of the United States

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code

Title 18

1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, initimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any such grand or petit juror in his person or property on account of any matter pending therein, or injures any such verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commis-

sioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Title 28

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringe-

ment of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rules of Court

RULE 53, FEDERAL RULES OF CRIMINAL PROCEDURE. REGULATION OF CONDUCT IN THE COURTROOM.

The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.

RULE 100, RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. FREE PRESS–FAIR TRIAL.

(1) All courthouse supporting personnel, including among others, marshals, court clerks, law clerks, messengers and court reporters, shall not disclose to any person

information relating to any pending criminal or civil proceeding that is not part of the public records of the court without specific authorization of the Court, nor shall any such personnel discuss the merits or personalities involved in any such proceeding with any members of the public.

(2) No photographs, radio or television broadcasts, or tapes for public replay, shall be made inside the United States Courthouse in connection with any civil or criminal proceeding, whether or not the court is in session. Contents of official tapes that are made as a part of the record in a case will be treated in the same manner as official stenographic notes.

(3) No attorney who has undertaken the representation of a defendant nor the prosecutor in a criminal case, whether that case is in progress or imminent, shall release or authorize the release of information not in the public record for dissemination by any means of public communication which is likely to interfere with a fair trial or otherwise prejudice the due administration of justice. No statement by any such attorney may be so disseminated containing the attorney's opinion as to guilt or innocence, as to credibility of witnesses, as to motives of the other party, or as to similar matters bearing on the conduct of the litigation.

(4) In a widely publicized or sensational civil or criminal case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

RULE 16, RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. RELEASE OF INFORMATION BY ATTORNEYS IN CRIMINAL CASES.

It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information

necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without

further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement or dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this Rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

RULE 17, RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. RELEASE OF INFORMATION IN CRIMINAL CASES BY PERSONNEL OF THIS COURT.

No personnel of this Court, including among others, marshals, deputy marshals, court clerks, bailiffs and court reporters, shall disclose to any person, without prior authorization by the court, any information relating to a pending criminal case which is not part of the public records of this Court. By way of illustration and not by way of

limitation, no personnel of this Court shall divulge any such information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

RULE 18, RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. SPECIAL ORDERS IN WIDELY PUBLICIZED AND SENSATIONAL CASES.

In a widely publicized or sensational case, the Court, on motion of either party or on its own motion, in the exercise of its general powers, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

SUPREME COURT, U. S.
Office-Supreme Court, U.
FILED
JUL 30 1969
JOHN F. DAVIS, CLERK

No. 230

In the Supreme Court of the United States

OCTOBER TERM, 1969

MILTON MARGOLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 289

MILTON MARGOLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 407 F. 2d 727 (Pet. 1A-15A).

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1969. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to July 2, 1969, and on June 27, 1969, the petition

was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the judgment of conviction should have been set aside on collateral attack because of allegedly prejudicial publicity before and during the trial.

STATEMENT

In October, 1960, petitioner was convicted in the United States District Court for the Eastern District of Wisconsin on two counts of an indictment which charged the corrupt endeavor to influence the official action of United States District Judge Robert E. Tehan, and of attempting to obstruct justice, both in violation of 18 U.S.C. 1503. A separate indictment, consolidated for trial, which charged attempted bribery of Judge Tehan, resulted in acquittal (6 T. 874-875).[1] The trial judge, Judge Swygert of the Northern District of Indiana, sitting by designation (5 Ex. p. 69), sentenced petitioner to concurrent terms of five years' imprisonment.[2] On direct appeal the

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[1] The record on file with the Clerk of this Court consists of a six-volume trial transcript, designated herein as "T."; a one-volume record of the *voir dire* of the jurors, designated herein as "V."; a one volume record of the present motion, designated herein as "R."; and also an envelope containing consolidated exhibits, segregated into five sections; a defense appendix containing excerpts from the trial testimony; and a one-volume transcript of post-trial motions and sentencing. These designations are in accord with those used by petitioner (Pet. 6).

[2] This sentence was to be served consecutively to the earlier one which had been imposed by Judge Tehan (see *infra*, p. 3).

convictions were affirmed. *Margoles* v. *United States*, 294 F. 2d 371 (C.A. 7), certiorari denied, 368 U.S. 930.

In 1967, petitioner filed his present motion to vacate judgment and sentence, pursuant to 28 U.S.C. 2255. He claimed that prejudicial pretrial publicity, publicity during trial, and the reading of newspapers by jurors deprived him of a fair trial (R. 1-10). In December, 1967, Judge Reynolds, of the Eastern District of Wisconsin, denied the motion without holding an evidentiary hearing, finding that the publicity attending petitioner's indictment and trial was neither massive nor prejudicial, and that the facts alleged by petitioner were insufficient to raise a doubt about the fairness of the trial (R. 64-71; Pet. 15a-22a). A motion to reconsider was denied (R. 102; Pet. 23a). The court of appeals affirmed (407 F. 2d 727; Pet. 1a-15a).

The evidence showed that on June 3, 1960, United States District Judge Robert E. Tehan sentenced petitioner to one year's imprisonment for income tax violations (1 T. 63). Petitioner desired to have his sentence modified so that the imprisonment would be suspended (2 T. 2, 4 T. 440). One Pikofsky, knowing that his neighbor Earl Villmow, a Milwaukee fireman, was friendly with Judge Tehan's son, suggested to Villmow that he might help petitioner get his sentence modified, and that, in turn, Villmow could get a loan he needed to expand and improve his home (4 T. 530). Villmow reported this conversation to Judge Tehan's son and later to Judge Tehan (2 T. 83-89). Judge Tehan called the F.B.I. (1 T. 64) and

on July 3, 1960, Villmow met with F.B.I. agents (3 T. 331). On July 4, Pikofsky called Villmow and urged him to call petitioner. After checking with the F.B.I., Villmow did so (2 T. 88-89). As a result of calls and meetings which followed, on July 12, 1960, petitioner turned over to Villmow a $5,000 Treasury bearer bond, a first installment of planned payments by which petitioner sought to obtain a suspended sentence (2 T. 114-119, 4 T. 440).

When trial commenced in October, 1960, petitioner's retained counsel made no motion for a change of venue, nor did he ask for a continuance on the grounds of prejudicial pretrial publicity. Counsel indicated that the procedure as to questions and challenges of prospective jurors, which the trial court outlined, would be acceptable to the defense (1 T. 10-11). The court questioned the jurors concerning their knowledge of pretrial publicity concerning the case (V. 24-32). Only one juror who served indicated he had formed an opinion (V. 25). The court questioned him further and he was later questioned by petitioner's counsel in some detail. He indicated he would render a proper verdict, based on the law and evidence in the case, without regard to any newspaper articles which he had read (V. 65). All jurors indicated they would commence their service as if they had never heard of the case (V. 49). None of the jurors who served knew Judge Tehan or any member of his family (V. 21), or felt that Judge Tehan's presence as a government witness would cause them "to lean" in favor of the government (V. 48, 54, 69, 84). Defense counsel questioned the jurors individ-

ually (V. 45-52, 55-65, 68-71, 75-78, 83-85, 87, 100), and challenged some, before he stated the jury was acceptable (V. 100-101).

During trial the jury was not sequestered but was told on various occasions that it was not to read any article concerning the case or to view or listen to any broadcasts (V. 80; 1 T. 23, 74-75; 2 T. 138; 5 T. 698; 6 T. 745). The news media reported the trial. Included in the reports was a story that the trial judge had rejected the proffered testimony of one Kraft to the effect that petitioner had asked him to intercede with Judge Tehan so that petitioner would obtain a suspended sentence (4 T. 460-469, 488; 5 T. 595, 598). In calling this story to the attention of the trial court, the defense counsel stated:

> I know your honor told them not to read it [newspaper reports] * * *. My motion is, * * * to examine the jurors and ask each one or all collectively whether any of them read anything in the papers * * * (5 T. 597-598).

In response to the collective inquiry, the jurors indicated they had not read, seen, or heard reports of the trial (5 T. 697). Near the close of the case, most of the jurors received letters, from a then unidentified source, later determined to be petitioner, dealing with informers who profit from the income tax troubles of others. All jurors who received such letters, after ascertaining that it might deal with the case they were participating in, declined to read the balance of the unsigned communication (*e.g.*, 6 T. 763, 767, 777-778). On the next court day the jurors advised the court that they had received letters (6 T. 764).

Each juror was thereafter individually questioned before the trial was permitted to continue, over defense protest that delivery of the letters was cause for mistrial (6 T. 772, 811).

ARGUMENT

The courts below properly concluded that petitioner received a fair trial before an impartial jury, and that there was no reason to set aside a judgment which had been affirmed on appeal. The examination of the jury, in which petitioner's counsel participated, was exhaustive, and occupies approximately one hundred pages on the record. That petitioner's case had aroused the public's interest and the reporting of it had caused one of the jurors to form a preliminary opinion did not impair the integrity of the trial. As this Court has noted, it is sufficient if a juror can lay aside his preliminary opinion and render a verdict based on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 723. In the present case, all jurors selected indicated that they would hear the evidence with an open mind. The fact that petitioner did not challenge for cause any of the jurors selected on the ground of prejudice based on the alleged unfavorable publicity, and that he did not exhaust his peremptory challenges, is clear evidence that his trial counsel did not believe that the pretrial publicity had unfairly influenced the jurors. Moreover, the fact petitioner was found not guilty on one count is strong evidence that the jurors were not biased and had based their opinion as to petitioner's guilt on the evi-

dence admitted in court. See *Dranow* v. *United States*, 307 F. 2d 545, 564 (C.A. 8).

Such publicity as petitioner's case did receive was neither massive nor prejudicial and none of it called for petitioner's conviction.[3] No carnival atmosphere was created by or for the benefit of the press. Cf. *Sheppard* v. *Maxwell*, 384 U.S. 333, 339-345, 358. Here the crime charged was not one of violence and the fact that only two of the many prospective jurors examined (one of whom was permitted by the defense to serve) had formed a preliminary opinion indicates persuasively that the local populace was not excited by the case. Moreover, the jurors selected were properly and repeatedly instructed not to read, view, or listen to news media accounts of the trial. No request for sequestration of the jurors was made. See *Welch* v. *United States*, 371 F. 2d 287 (C.A. 10), certiorari denied, 385 U.S. 957.

Judge Tehan appeared at trial as a witness and testified only briefly as to his imposition of a sentence on petitioner and that he later had a conversation with Villmow, without relating the substance of the conversation. He neither condemned petitioner nor

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[3] Judge Tehan initially declined to make any statement to the press (R. 15). Later, before the trial Judge Tehan found it necessary to write to Villmow's superior, the Milwaukee city fire chief, in praise of Villmow (R. 21, 22, 24). Others associated with law enforcement also praised Villmow's cooperation (Pet. 8-9). This may have been thought necessary in order to protect Villmow's job security. In any event, there is no indication that such pretrial praise of Villmow had any effect on the jurors before or during trial.

praised Villmow. He testified he had known Villmow only briefly and did not know if he was a friend of his son (1 T. 63-64, 69).[4] The only trial praise of Villmow came from defense witness Pikofsky who testified on direct that Villmow and his family "are very fine people" (4 T. 525). Since Judge Tehan was not the trial judge in the present case, and appeared as a rather perfunctory prosecution witness, petitioner's reliance on *In Re Murchison*, 349 U.S. 133, 136 (Pet. 15, 17) is misplaced.

Petitioner contends that the group inquiry of the jurors concerning the report of the profferred Kraft testimony, which was conducted pursuant to his counsel's suggestion, was insufficient (Pet. 20, 22). While the exposure of jurors through news accounts to information that was not admitted at trial may be grounds for reversal, each case rests on its own special facts. *Marshall* v. *United States*, 360 U.S. 310. It was not error to ascertain by a collective inquiry the fact that none of the jurors had been aware of the report. *Pearson* v. *United States*, 378 F. 2d 555, 559-561 (C.A. 5), certiorari denied, 389 U.S. 1039. Only after it has been ascertained that some jurors have violated the instructions of the court regarding news media information, does it become necessary that

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[4] Other reports which petitioner indicates were inaccurate (Pet. 6, 12), such as petitioner's efforts to elude the F.B.I. arresting officers and the scope of the planned payments, had a factual basis. Petitioner was apprehended after he departed his hospital by utilizing the fire-escape (4 T. 417, 423; 5 T. 613, 725), and Villmow testified that figures as large as $30,000 were mentioned in their discussions (2 T. 114).

the jurors be individually examined. See *Rizzo* v. *United States*, 304 F. 2d 810, 815-816 (C.A. 8), certiorari denied, *sub nom. Nafie* v. *United States*, 371 U.S. 890; *Adjmi* v. *United States*, 346 F. 2d 654, 660 (C.A. 5), certiorari denied, 382 U.S. 823.[5] Moreover, while petitioner protests this newspaper reporting of the Kraft testimony (Pet. 12, 14, 20), petitioner gave the same information to the jury when he testified that he had told Villmow that he had sought Kraft's intervention in appealing to Judge Tehan in regard to his sentence (5 T. 675).

After it had been ascertained that the jurors had been the recipients of letters[6] which might have a bearing on the case, the jurors were individually questioned. Each juror stated he had not discussed the substance of the communication with the others, with the foreman explaining that he had busied himself that morning at court with reading his newspaper (6 T. 806; see Pet. 13). Petitioner asserts that this answer dispels "the fantasy that the jurors were insulated from press accounts of the trial" (Pet. 20). Yet, it was this same juror who first called the receipt of the letter to the court's attention (6 T. 764), with-

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[5] *Coppedge* v. *United States*, 272 F. 2d 504 (C.A.D.C.), certiorari denied, 368 U.S. 855 (Pet. 22), on which petitioner relies, involved a failure to question jurors individually after some jurors had indicated, in response to a collective question, that they had read the newspaper reports concerning the progress of the trial.

[6] These letters led to petitioner's subsequent indictment and guilty plea to communicating with jurors in violation of 18 U.S.C. 1504 (see section 4, of the Consolidated exhibits on file with the Court).

out reading it because he thought that the letter might pertain to the case and that such reading would be in violation of the court's instructions (6 T. 763). It is illogical to assume that the juror who declined to read a private communication and called receipt of it to the court's attention would read the public reports concerning the progress of the case. The trial court did not forbid the reading of newspapers, but repeatedly forbade the reading of any article concerning the case. The fact that all jurors who received the letters declined to read them, and that the jurors indicated that they had not learned of the news media account of Kraft's proffered testimony, is persuasive evidence that the jurors were conscientious and were effectively insulated from news media accounts of the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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